No. 12884.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE CO., and WEST TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAYMOND M. CRANE, RED LION PACKING COMPANY and JOHN C. KAZANJIAN,

Appellees.

Appellants' Reply to Brief of Appellee Raymond M. Crane Doing Business as Associated Fruit Distributors of California.

HARRY A. PINES,
ADELE WALSH,
417 South Hill Street,
Los Angeles 13, California,

J. MANUEL HOPPENSTEIN,
Southwestern Life Building,
Dallas 1, Texas,

Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

Preliminary Observations.

Appellee Crane's brief is distinctive by its avoidance of many of the principal issues of this case. Since such silence constitutes inferential admission, attention is directed to many of the principal points left uncontroverted by Crane, to wit:

1. The written communications exchanged by the parties are complete and unambiguous, and constitute a binding agreement of sale upon Kazanjian as seller and appellants as buyers. (Our Op. Br. p. 27.)

2. Where no ambiguity is contained in a written contract, the construction of the contract must be derived solely from the language therein. (Our Op. Br. p. 35.)

3. An appellate court is not bound by the interpretation given to written documents by the trial court. (Our Op. Br. p. 35.)

4. Findings of fact, although supported by some substantial evidence, are not binding upon an appellate court where they are clearly against the weight of the evidence, or are induced by an erroneous view of the law. (Our Op. Br. p. 34.)

5. The contention that a Standard Confirmation of Sale was a requirement of the contract of this case was never mentioned in the correspondence between the parties or in the proceedings before the Secretary of Agriculture. (Our Op. Br. p. 33.)

6. Where there has been a meeting of the minds of contracting parties, the subsequent failure to reduce the contract to a precise form is immaterial. (Our Op. Br. pp. 32, 33.)

7. The Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry promulgated by the Department of Agriculture defines the phrase "subject to confirmation" as the method of providing that the seller must accept the buyer's order before it becomes binding. (Our Op. Br. pp. 35 and 36.)

8. Evidence of an undisclosed intention of a contracting party is immaterial and inadmissible. (Our Op. Br. pp. 36 to 38.)

9. The contract was not void for reason of a violation of the Emergency Price Control Act. (Our Op. Br. p. 49.)

10. The market price as of the date when delivery may rightfully be demanded by the buyer and not the market price on the date of the anticipatory breach is the correct measure of damages. (Our Op. Br. pp. 49 to 52.)

With respect to appellants' contentions (1) that the District Court erroneously applied the Statute of Frauds as a bar to recovery (Our Op. Br. pp. 44 to 47), and (2) that the District Court erred in concluding that Kazanjian and Margules had never accepted each other's proffered terms (Our Op. Br. pp. 41 to 43), appellee Crane states that "any argument" presented by counsel for Kazanjian thereon is adopted by Crane. (Crane's Br. p. 21.) *This wholesale adoption of an argument in futuro, valid or not, is an unbelievable display of confidence, between parties presumably adverse in interest to each other.*

II.

Crane Was Broker for Both Parties and Not Merely the Agent of the Buyers.

A major portion of Crane's brief (pp. 4-15) is devoted to a denial of appellants' contention that Crane was a broker acting both for Kazanjian, the seller, and for appellants, as buyers. In our Opening Brief (p. 24) we pointed out that the issue of agency is not a critical one, and that Kazanjian is liable for the breach of contract irrespective of whether he breached the contract through Crane as agent for the seller or through Crane as agent for the buyers, or, as we contend, through Crane acting as a broker for both buyers and seller.

Crane asserts that appellants in their complaint before the Secretary of Agriculture merely alleged that Crane had acted for himself and as agent of Kazanjian, the seller. Such allegation does not afford comfort to Crane's contention that he was exclusively the agent of appellants. The breach of contract charged in the complaint was the act of Kazanjian, as seller, through the offices of Crane, a licensed broker, in his capacity as agent of the seller.

It is true that the Secretary of Agriculture's findings did not specifically find that Crane acted as both agent for buyers and the seller. The Secretary filed a "Preliminary Statement, Findings of Fact, Conclusions, and Order." [Tr. p. 41.] In the "Conclusions," the Secretary of Agriculture stated that the ordinary function of a broker is to handle negotiations between contracting parties, that he may initially be the limited agent of one party, and then become the agent also of the other party when permitted to transmit offers or counter-offers for them. He further concluded that the fact that one of the

parties is to pay a broker's commission does not necessarily mean that the broker acts solely as agent for that party. [Tr. p. 53.] That Congress did not intend to limit the effect of the Secretary's fact findings as the established facts of the case to merely formal findings of fact is evidenced by the language of Section 499g(c), Title 7, U. S. C. A. Such Act specifically provides that the "findings of fact *and the orders*" of the Secretary shall be *prima facie* evidence of the facts of the case. It is the expressed congressional intent that the factual findings contained in the *entire* order made by the Secretary of Agriculture become *prima facie* evidence of the facts of the case.

Crane urges that appellants admit that Crane was their agent. Inasmuch as Crane, a broker, was acting as agent for both buyers and the seller, it follows that he was also the agent for appellants. It does not follow that he was solely or exclusively the agent of appellants.

Crane refers to testimony of Crane and Kazanjian that Crane was not the agent of Kazanjian. This evidence consists merely of self-serving conclusions. Not only is such evidence insufficient to overcome the *prima facie* effect of the Secretary's findings, but the self-serving conclusions of appellees are refuted by their *admitted conduct*. Crane's brief does not deny that he sent a telegram to Kazanjian informing Kazanjian that *Crane had sold the grapes for the account of Kazanjian.* [Tr. p. 453.] Crane does not deny that *Kazanjian admitted* that after Kazanjian refused to go through with the deal, *Crane acted as Kazanjian's agent* in offering to deliver the grapes for a higher price. [Tr. p. 289.] Nor does Crane deny that on October 4, 1944, Kazanjian sent a telegram to Crane approving the sale by Crane of the

grapes *for Kazanjian's account.* [Tr. p. 454.] Certainly the undisputed conduct of the parties negatives any probative value of self-serving declarations contradicting admitted conduct.

That Crane was acting as Kazanjian's agent for the sale of Kazanjian's grapes is further evident from the telegram sent by Crane to Kazanjian on October 3rd. Crane said, "Referring telephone *have sold for your account* * * * block Emperors mentioned * * * now depending *you handle through us balance cars you mentioned for fresh shipment.*" [Tr. p. 453.] Having acted as Kazanjian's agent in selling one block of grapes for Kazanjian's account, Crane was asking Kazanjian to use Crane as his agent in the sale of additional cars mentioned by Kazanjian to Crane.

The denials of Kazanjian and Crane that Kazanjian had given Crane authority to act as his agent are rendered nugatory by Kazanjian's ratification of Crane's authority to act in his behalf—by telephone on October 2d [Tr. pp. 308-309] and by telegram on October 4th. [Tr. p. 454.] Even if such authority had been absent at the commencement of the negotiations, the ratification is "equivalent to previous authority, and results as effectively to establish the relations of principal and agent as if the agency had been authorized in the beginning."

Ballard v. Nye, 138 Cal. 588, 72 Pac. 156.

Crane's brief contends that a broker is the agent of the person who pays his compensation. Cases cited by Crane in support of such argument go no further than to hold that payment of compensation is indicative of such agency. None of the cases cited indicate such factor to be con-

clusive of such relationship. All of the cases cited by counsel are decisions of the Secretary of Agriculture. The Secretary in the instant case, specifically held that the fact that one of the parties is to pay the broker's commission does not necessarily mean that the broker acts *solely* as agent for that party. [Tr. p. 53.]

III.

"Part Payment With Confirmation" and "Offer Subject to Confirmation" Do Not Mean a Standard Confirmation of Sale.

Commencing with page 16 of Crane's brief, we find an argument entitled "Answer to Contention That a Standard Confirmation of Sale Was Not Necessary." Here, Crane attempts to defend a conclusion of law holding that the telegrams which Crane sent to Margules contained a requirement that any contract which the parties entered into was to be confirmed in writing by such parties. [Tr. p. 82.] This argument is difficult to follow since Crane interlocks such contention with defense of a finding to the effect that Crane, when he used the words "$500.00 part payment with confirmation" and the code word "ADLAM," meaning "offer subject to confirmation," intended by such language that the sale be negotiated by Standard Confirmation of Sale. [Tr. p. 77.]

The argument is hopelessly confused by the interchangeable use of the terms "confirmation in writing" and "Standard Confirmation of Sale." The former phrase is a general and descriptive one. The latter refers to a particular form of document.

We asserted as error both the conclusion of law and the finding of fact hereinabove referred to. We ad-

dressed our arguments on each separately, and any intelligent consideration must be predicated upon separate consideration of each.

The error charged against the conclusion that the telegrams from Crane to Margules required written confirmation by all parties, is based upon the fact that such telegrams do not expressly or inferentially contain such requirement.

Crane argues that the language "part payment with confirmation" and "offer subject to confirmation" in Crane's September 26th telegram calls for written confirmation by all parties. Confirmation consists of the act of confirming or of ratifying. Confirmation or ratification may be oral or it may be by writing. (*Milliken-Tomlinson Co. v. American Sugar Refining Co.* (C. C. A. 1), 9 F. 2d 809, 813.)

Crane advised the brokers to whom he was offering Kazanjian's grapes for sale, that his *offer* was subject to confirmation, or, in other words, that the offer was subject to the seller's acceptance or ratification. He was referring to confirmation of the *offer,* not the entire transaction. Nor did he indicate that such confirmation had necessarily to be in writing or upon a particular form. Crane's conduct in wiring Margules that he had secured Kazanjian's confirmation after his telephone conversation with Kazanjian, makes crystal clear that *Crane was not referring to written confirmation,* or to confirmation from other than the seller. The use of the word "confirmation" in connection with the phrase "part payment with confirmation" is strictly a reference to "time." The terms of the offer provided for part payment of the purchase price at the *time* when the act of confirmation

took place. Subsequently Crane modified these terms by providing that the part payment was to be made *at the time* of government inspection when the grapes were loaded. [Tr. p. 476.] Even had the September 26th telegram provided for written confirmation by all of the parties hereto, both buyers and seller did in fact confirm the transaction in writing. Margules' written messages ordering the grapes and accepting the terms submitted by Crane embraced all of the elements of confirmation. Kazanjian, the seller, confirmed both orally and in writing. [Crane's Br. p. 22 ff., and Tr. p. 25.]

The District Court apparently decided that the Standard Memorandum of Sale sent by Margules to Crane was not the appropriate form of confirmatory document, and that a contract failed to come into existence because of the failure to use a Standard Confirmation of Sale form. Other than making descriptive findings as to the existence and use of the two forms known as Standard Memorandum of Sale and Standard Confirmation of Sale [Tr. pp. 77, 78], the District Court made no finding with respect to a Standard Confirmation of Sale except that when *Crane* used the words "part payment with confirmation" and "offer subject to confirmation," *Crane intended* that such sale be negotiated by a Standard Confirmation of Sale. [Tr. p. 77.]

The District Court did not and could not find that such language by custom or otherwise, conveyed such meaning. Crane's failure to take issue with the meaning of "subject to confirmation" as defined by the Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry, is highly eloquent. (Our Op. Br. p. 35.) Does Crane intend to infer that every time the

words "part payment with confirmation" or "subject to confirmation" are used in the perishable fruit industry, that the parties are directing a use of the form known as Standard Confirmation of Sale? If so, such inference is refuted by some 4000 reported decisions of the Secretary of Agriculture under the Perishable Agricultural Commodities Act, in not a single one of which has such a contention ever even been suggested! (See Digest of Decisions of the Secretary of Agriculture Under the Perishable Agricultural Commodities Act, second revised edition.)

Were we to suppose that Crane did intend a Standard Confirmation of Sale, the language he used failed utterly to disclose such intention. Our authorities establishing that an undisclosed intention cannot be the basis of a contractual provision only meet with further eloquent silence in the Crane brief. (Our Op. Br. pp. 38-39.)

Crane argues that *he* had testified that, in accordance with a custom of the trade, a standard confirmation of sale is *always* required in the case of a sale for *future delivery.* Such a custom was not pleaded in this case. The District Court did not find the existence of such custom. The evidence was insufficient to support a finding of custom. The existence of a usage or custom can only be proved by *numerous instances of actual practice,* and not by the opinion of a witness. (*California Fruit Exchange v. Henry,* 89 Fed. Supp. 580, 586.)

One seeking to establish a custom has the burden of proving it by evidence *"so clear, uncontradictory and distinct as to leave no doubt as to its nature and character."* (*California Fruit Exchange v. Henry, supra.*) The existence of such custom in the instant case was attempted

to be proved by a single witness. The testimony was neither clear nor uncontradictory, nor distinct. In fact, it was refuted and contradicted by the testimony and conduct of the witness himself. Crane admitted that as a matter of custom, the selection of the form of document was strictly an *individual matter*. [Tr. p. 246.] Most significant of all, is Crane's own conduct. Crane admitted that during the remainder of the year 1944, he sold all of Kazanjian's grapes, that all of such grapes were sold for future delivery, and not in a single instance did he obtain a Standard Confirmation of Sale. [Tr. p. 247.] Crane admitted that once he received the Standard Memorandum of Sale from Margules, he considered no other document necessary for the closing of the transaction other than the government inspection reports. [Tr. p. 249.]

In defense of the conclusion that the telegrams from *Crane to Margules* required signatures of all parties, Crane refers to his *telegram to Kazanjian* of October 3rd which stated "will forward confirmations for your signature soons received airmail from buyers." Margules promptly sent a Standard Memorandum of Sale to Crane. Crane could have sent it to Kazanjian for signature. He did not do so apparently because Kazanjian did not insist upon a confirmation for his signature. Instead he sent a telegram to Crane notifying him that the sale was satisfactory. [Tr. p. 454.] This telegram, in accordance with Crane's own testimony was sufficient substitute for a Standard Confirmation of Sale. [Tr. pp. 245, 246.]

There is nothing in the telegrams and teletype messages exchanged between Crane and Margules that warrants the conclusion that a Standard Confirmation of Sale would

have to be signed by Kazanjian or by the buyers. A possible explanation of Crane's October 3rd statement to Kazanjian that he would forward confirmations as soon as he received them from the buyer, is found on pages 232 and 233 of the Record of Transcript, U. S. Court of Appeals (Ninth Circuit), Docket No. 12662 in the case of *Joseph Denunzio Fruit Company v. Raymond M. Crane*. It will be noted that the *Denunzio* case involved the sale of the remaining 5 of the 15 carloads referred to in Crane's October 3rd telegram to Kazanjian. Crane had by teletype of such date assured A. B. Rains, the broker for Denunzio, that *Crane would forward two copies of a confirmation* for the signatures of the buyers. Rains thereupon replied that he would air mail the checks with the signed confirmations *when he received* "your copies."

No similar arrangement was effected with Margules. Appellants are not affected by the negotiations between Crane and some other broker. Without question the signing of confirmations was strictly a formality and not a condition of the contract. Kazanjian evidenced his acceptance of the sale in writing. There is no reason to believe that if Kazanjian had insisted upon signatures of the buyers on a specific form of confirmation (the record does not reveal such a demand), that the buyers would not have furnished same upon request.

The conclusion that the telegrams *from Crane to Margules* required a written confirmation signed by all parties, is apparently predicated upon the finding that Crane, in his telegram of September 26, 1944, by the use of the words, "part payment with confirmation" and "offer subject to confirmation," intended that a Standard Confirmation of Sale be used by all parties. [Tr. p. 77.]

The finding does not support the conclusion, the conclusion referring to a generality and the finding referring to a specific form. Nor is the finding supported by the evidence. The language of the telegram being unambiguous, it was improper for the District Court to inject an additional meaning foreign to the natural import of the language used.

In the case of *El Zarape Etc. Factory v. Plant Food Corp.,* 90 Cal. App. 2d 336, 203 P. 2d 13, the court said:

> "No ambiguity appears in the contract. It must, therefore, be considered as containing all of the terms agreed upon by the parties, and there can be no evidence of the terms agreed to other than the contents of the writing. (Code Civ. Proc., §1856.) The ultimate effect of Carranza's testimony is to add by parol an additional term not embodied in the written contract. The parol evidence rule is not a rule of evidence. It is one of substantive law. If evidence of conversations and negotiations preceding or contemporaneous to the execution of the writing is admitted it must be ignored. It has no legal force."

The requirement of a Standard Confirmation of Sale was a fiction adopted many years after the transaction had been completed. It was neither intimated nor suggested until the trial *de novo.* Only the lifting of the ceiling price was mentioned as an excuse for non-delivery of the grapes in the correspondence which followed the breach of contract. Ample opportunity for mention of the allegedly "fatal" absence of a Standard Confirmation of Sale existed in the pleadings and in the trial proceedings before the Secretary of Agriculture. Further opportunity was available to Kazanjian to mention the point in his petition before the District Court setting forth the

grounds upon which he sought to defeat the right of appellants to recover damages. [Tr. pp. 5 to 12.] Crane had opportunity to assert the defense in his amended answer in the District Court. [Tr. p. 64.] Both appellees could have mentioned the point in the testimony given by them in April of 1950 upon depositions taken prior to trial. [Tr. pp. 267 ff., 299 ff.] Not even in the pretrial briefs filed with the District Court was it suggested that the contract of sale called for a Standard Confirmation of Sale, or that because of the lack of such document, a contract had failed to come into existence.

An appellate court may be bound by findings of the trial court where the evidence is conflicting and there is substantial evidence to support the finding reached by the trial court. Where the finding purports to change the plain language of an unambiguous written document, where the testimony consists of self-serving declarations of an interested party claiming that the language he used was intended by him to have a different and special meaning, where custom is neither pleaded nor found to exist, where the testimony of a single witness is relied upon to establish custom without evidence of numerous instances of such practice, where the testimony of custom is not clear or reasonable, and is contradicted by the other testimony and the conduct of the same witness, and, where the artificial meaning sought to be injected into the contract was apparently conceived almost six years after the transaction itself and was not mentioned in extensive correspondence and trial proceedings that preceded the trial in the District Court, it would be a woeful deficiency of our appellate judicial system if an appellate court was helpless to rectify the clear mistake and error of the trial court in the making of such finding.

IV.

If Kazanjian Did Not Confirm the Sale, Crane Was False in Representing That He Had Done so.

It is but fair to say that we agree with Crane that his representation that he had secured Kazanjian's confirmation was not a false representation.

Crane cites the findings of the Secretary of Agriculture to the effect that Kazanjian had orally confirmed the sale in a telephone conversation on or about October 2, 1944. (Crane's Br. p. 23.) The District Court finding, however, was ambiguous as to this telephone conversation. The District Court found that Kazanjian had informed Crane that he was willing to sell 15 cars of grapes "upon the terms to be set forth in a confirmation." [Tr. p. 75.] This latter quoted portion of the District Court's findings qualifies the oral confirmation. If such qualification could be supported by the evidence, then Crane had no right to report an unqualified confirmation, and such representation was false and untrue. Inasmuch as the qualification is not supportable by the record, Crane has a right to deny the falsity of his representation.

V.

If Crane Contemplated the Use of a Standard Confirmation of Sale, His Failure to so Notify Appellants Justifies Recovery Against Crane.

For the sake of argument, if the contract called for such a Standard Confirmation of Sale form, Crane was obviously under a duty to so inform appellants. When Crane received the Standard Memorandum of Sale, he was duty bound to notify Margules that such Memorandum would not be satisfactory, and that a Standard Confirmation of Sale would be required.

7 U. S. C. A., Section 499b(4) declares it to be unlawful for a broker "to fail, without reasonable cause, to perform any specification of duty, express or implied, arising out of any undertaking in connection with any such transaction."

Crane argues that he cannot be held liable for such breach of duty because the complaint before the Department of Agriculture did not set up a cause of action in fraud and misrepresentation. Crane supports this argument with citation of cases involving *actual fraud.*

While *7 U. S. C. A.,* Section 499b(4) declares that the broker is liable for false statements made "for a fraudulent purpose," the element of fraud is not mentioned with respect to the liability of a broker to perform a duty, expressed or implied. This was not a case of actual fraud, but one of constructive fraud. Under *California Civil Code,* Section 1573, constructive fraud consists of "any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." Constructive fraud exists even where material statements are made without a fraudulent intention to deceive.

> *Hayter v. Fulmor,* 92 Cal. App. 2d 393, 398, 206 P. 2d 110.

It would have been impossible for appellants to plead a failure of performance of duty arising out of Crane's failure to notify appellants that he desired a Standard Confirmation of Sale form. Such contention was unknown to appellants until July 12th, 1950, when during the course of the trial *de novo,* such contention was made for the first time!

Pleadings before the Secretary of Agriculture are liberally construed. The Secretary has repeatedly held that recovery will not be denied if the facts proved show a violation of the Perishable Agricultural Commodities Act even though the complaint fails specifically to charge the precise violation.

Southern Brokerage Co., 3 A. D. 892;

Gilinsky Fruit Co., P. A. C. A., S. 1195;

Quality Produce Co., P. A. C. A., S. 741;

Farm Bureau Fruit Produce Co., 9 A. D. 1347;

Joe Perone, 8 A. D. 1050.

VI.

If Crane Is Liable in This Case, It Is Not Upon the Theory of Kazanjian's Breach, but Because of His Own False Misrepresentations and Breach of Duty as a Broker.

The arguments made on pages 29 to 33 of Crane's brief to the effect that he is not liable for the breach of Kazanjian because Kazanjian was not an undisclosed principal, is not directed to any of the issues of this case. Appellants have made no such contention.

If Kazanjian did not breach the contract, Crane is liable because of falsely representing that Kazanjian had confirmed the sale, and for failing to notify appellants that the Standard Memorandum of Sale was not acceptable.

Conclusion.

In our opening brief, we urged that the written documents by themselves establish the existence of a binding contract and reveal the breach of that contract by Kazanjian. Crane's brief merely spotlights the many inconsistencies and incongruities of the District Court decision.

This relatively simple case has been rendered confusing by a multitude of defenses, some of which found acceptance by the District Court despite lack of evidentiary support, despite lack of reason, and despite the fact that the contract was complete and unambiguous.

We respectfully pray that the decision of the District Court be reversed.

Respectfully submitted,

Harry A. Pines,
J. Manuel Hoppenstein,
Adele Walsh,
Attorneys for Appellants.